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projectmail

From: Stephanie [stephanie@saveourenvironment.org]
Sent: Monday, March 03, 2008 2:05 PM
To: doi_nepa
Cc: 'Stephanie '
Subject: RIN 1090-AA95

Dear Dr. Rai,

Please find comments on the on the Department of Interior's proposed rule to codify its NEPA procedures currently in the Departmental Manual (Federal Register, Volume 73, No. 1, pages 126-140).

Please let me know if you have any questions.

Thank you,

Stephanie

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Defenders of Wildlife
Klamath Siskiyou Wildlands Center - National Audubon Society National Trust for Historic Preservation
Natural Resources Defense Council - The Lands Council
The Wilderness Society - Western Watersheds Project

March 3, 2008

Via electronic mail (doi_nepa@contentanalysisgroup.com) and U.S. Mail

Department of the Interior
NEPA Proposed Rule
c/o Bear West
1584 S. 500 W. Suite 201
Woods Cross, UT 84010

Re: Implementation of the National Environmental Policy Act (NEPA), 73 Fed. Reg. 126 (January 2, 2008) RIN 1090-AA95

Dear Dr Rai,

These comments are submitted in response to the Federal Register Notice on the Department of Interior's proposed rule to codify its NEPA procedures currently in the Departmental Manual. Federal Register, Volume 73, No. 1, pages 126-140. The undersigned organizations appreciate the opportunity to comment on the proposed rule. Our comments are detailed below.

Use of Categorical Exclusions

We urge DOI to ensure that its bureaus involve the public in the development and application of categorical exclusions and clearly state that extraordinary circumstances need to be provided for unless Congress specifically exempts an agency from doing so. We offer the following specific suggestions to improve the use of categorical exclusions under NEPA.

First, DOI should clearly require that the bureaus document their decision to use a categorical exclusion including a statement explaining the absence of extraordinary circumstances. A bureau must provide the opportunity for the public to discuss a disagreement over the use of a categorical exclusion before irrevocable action is taken. Failure to do so violates NEPA's purpose to ensure that the public "play a role in the decision-making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). In addition, failure to do so also violates the mandate of the Federal Land

Policy and Management Act ("FLPMA") directing the Secretary of the Interior to provide for public participation in "the preparation and execution of plans and programs for, and the management of, the public lands." 43 U.S.C. § 1739(e). This mandate requires public participation in individual management decisions related to the public lands, and not simply in the development of land use plans. *NWF v. Burford*, 835 F.2d 305, 322 (D.C. Cir. 1987).

Second, we believe that the disagreements over the use of categorical exclusions could be reduced if DOI's NEPA regulations increased transparency in the application of categorical exclusions. One way DOI can increase transparency is by requiring that bureaus establish accessible and up-to-date registers of NEPA actions. Internet-accessible registers that identify agency actions under NEPA-including the application of categorical exclusions-provide an important mechanism for informing the public how their lands are being managed. Such registers would also help DOI fulfill its responsibility to provide for meaningful public involvement in decisions determining how public lands are used and public funds are spent. *See, e.g.*, *Robertson*, 490 U.S. at 349 (NEPA guarantees "that the relevant information will be made available to the larger audience that may also play a role in the decision-making process and the implementation of that decision"); 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). Some bureaus and field agencies are doing this well; others are not.

Third, we recommend the deletion of Section 46.205(d) from the proposed regulations. This language is not included in the current DOI NEPA implementing procedures and should not be added now. Section 46.205(d) states:

> (d) Congress may establish CXs by legislation, in which case the terms of the legislation determine how to apply the CX.

Our concern is that this language does not clearly state that bureaus must provide for extraordinary circumstances unless Congress explicitly exempts a bureau from doing so. 40 CFR § 1507.3(b)(1). In the past, the Bureau of Land Management (BLM) has unlawfully advised that categorical exclusions established by Congress in Section 390 of the Energy Policy Act of 2005 are not limited in their application by extraordinary circumstances. *See* BLM Instruction Memorandum 2005-247 (Oct 5, 2005), Attachment 2. ("the CXs established by Section 390 [of the Energy Policy Act of 2005] are not subject to the requirement in 40 CFR 1507.3 that would preclude their use when there are extraordinary circumstances"). BLM is mistaken in its application of the language in the Energy Policy Act of 2005 related to categorical exclusions and is required to provide for extraordinary circumstances. We believe that Section 46.205(d) will continue to perpetuate this misinterpretation of the CEQ regulations unless it is deleted or at a minimum modified.

Cumulative Impacts

We also recommend deleting Section 46.115 from the proposed regulations. Section 46.115 seeks to limit consideration of cumulative impacts to those that are:

> in the judgment of the bureau, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for bureau action and its alternatives.

DOI's NEPA Implementing Procedures as revised in 2004 do not contain such a provision addressing consideration of past action in the cumulative effects analysis, and DOI should not include this provision in DOI's NEPA regulations. The addition of the overly-vague phrase – "a significant cause-and-effect relationship" – to the DOI NEPA regulations will result in more, rather than less, confusion and litigation.

Instead, bureaus within DOI should conduct environmental analyses pursuant to CEQ's regulations, which define cumulative impacts, and the case law that has applied these regulations to specific facts. CEQ's regulations provide a clear definition of cumulative impacts:

> "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R § 1508.7.

NEPA's obligation to look at cumulative impacts is to ensure that an agency does not evaluate a project "in a vacuum." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002). Indeed, NEPA is intended to ensure that bureaus make sound decisions informed by the "cumulative and incremental environmental impacts" of the proposed projects and how those impacts will actually affect the environment. *See, e.g., Ctr. for Biological Diversity v. Nat'l Hwy Traffic Safety Admin.*, 508 F.3d 508, 550 (9th Cir. 2007); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2004) (Corps failed to take a hard look at cumulative impacts of dock extension and potential increase in crude oil tanker traffic). "A necessary component of NEPA's 'hard look' is 'a sufficiently detailed catalogue of past, present, and future projects, and [ ] adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.'" *Oregon Natural Resources Council Fund v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007) (quoting *Lands Council v. Forester of Region One*, 395 F.3d 1019, 1027-28 (9th Cir. 2005).

Incomplete or Unavailable Information

We are further concerned that when considering whether it is too expensive to obtain missing information that is important for NEPA analysis, DOI directs its bureaus to consider non-monetized social costs without proper direction. Section 46.125 states

> the over-all costs of obtaining information being exorbitant refers not only to monetary costs, but can include other non-monetized social costs when appropriate.

This proposed language does not define the type of costs that can be considered. The only guidance offered to the bureaus is one example of a "non-monetized social cost": the "social-economic and environmental (including biological) costs of delay in fire risk assessments for high risk fire-prone areas." 73 Fed. Reg. 126, 129 (Jan. 2, 2008). This guidance is inadequate and fails to meaningfully direct the bureaus on how to address the potential "non-monetized social costs" when preparing an EA or EIS.

Accordingly, we recommend that Sec. 46.125 address and expand upon 40 C.F.R. § 1502.22, CEQ's regulation addressing proper agency procedure in the face of incomplete or unavailable information. DOI should direct its bureaus to specifically evaluate the risks of proceeding without relevant information, including the risks to sensitive resources such as special status species and to health and safety, *prior* to making a decision without it. Bureaus should also be required to provide their findings to the public so that the public can provide meaningful comment and scrutiny. Such an approach would be more consistent with relevant case law, which has emphasized agencies' responsibilities to conduct research in order to obtain sufficient information. *See, e.g.*, *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248-49 (9th Cir. 1984) (The duty to conduct independent research when faced with incomplete or unavailable information insures that agencies comply with NEPA's central purpose "to obviate the need for . . . speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.").

This direction would also better reflect the bureaus' position as stewards of our public lands and the resources they support, such as FLPMA's directive that the BLM "minimize adverse impacts on the natural, environmental, scientific, cultural, and other resources and values (including fish and wildlife habitat) of the public lands involved." 43 U.S.C. §1732(d)(2)(a). We are concerned that if Section 46.125 is left unchanged, DOI has provided the bureaus with an incentive to cease collecting information and providing it to the public.

Adaptive Management:

Federal agencies often incorporate adaptive management into their NEPA analysis and rely on adaptive management as a basis to conclude that potentially significant impacts will be mitigated. The proposed regulations contain a directive that encourages agencies to use adaptive management. Section 46.145 states:

> Bureaus should use adaptive management as part of their decision making processes, as appropriate, particularly in circumstances where long-term impacts may be uncertain and future monitoring will be needed to make necessary adjustments in subsequent implementation decisions.

In order for adaptive management to be an accepted approach to the management of public lands and to mitigate potential environmental impacts, bureaus must provide sufficient

detail and commitments as to how impacts will be measured, avoided or mitigated. We urge DOI to require its bureaus to make this descriptive plan available to the public so that the public has an opportunity to provide meaningful comments. The bureaus should also present a scientific basis to support the bureau's conclusion that the prescribed measures will be successful, and address the prioritizing of tasks if funding is inadequate.

We recommend that Section 46.145 be augmented by including the following requirements and safeguards:

- A limitation to clarify that adaptive management is only appropriate where the risk of failure will not cause harm to sensitive resources and where the bureau has a scientifically-supported basis for concluding that adaptive management will be successful.

- A requirement that a sufficient inventory of current conditions of affected resources be included. Where the bureau does not have a sufficient inventory of baseline conditions, the regulation should specify that the agency must complete such an inventory prior to using adaptive management.

- A requirement that a detailed monitoring plan be prepared. The monitoring plan should include a description of the resources and specific indicators that will be measured, defined limits of acceptable change in resource conditions, and specific actions that will be taken if change reaches or exceeds those limits.

- A requirement that a "fallback" plan is prepared. The "fallback" plan should address what a bureau will do if monitoring or other aspects of the adaptive management process is not fully carried out, including if adequate funding is not available. The bureau's ability to reevaluate or amend desired outcomes should not be the sole fallback if either the adaptive management process is not working or outcomes are not being met. Bureaus should also be required to incorporate provisions to address situations based on new information, circumstances, regulatory requirements, or discontinued agency funding for monitoring that would trigger a new NEPA analysis.

Section 46.145 also states that adaptive management is the preferred method of management where knowledge about natural resource systems is uncertain. However, this language does not include requirements to ensure that lack of information is not used as an excuse to allow actions to proceed without sufficient protective measures or to permit destruction of natural resources.

Section 46.415(b)(3) also directs bureaus on the use of adaptive management, and specifically provides for including adaptive management in a proposed action or alternative in an EIS. Section 46.415(b)(3) states:

> A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative

> and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.

While this section requires that resulting adjustments of actions be clearly articulated, specified and fully analyzed it fails to include the same critical safeguards mentioned above. We urge that the aforementioned safeguards are incorporated into Section 46.415(b)(3) as well.

Emergencies

We recognize that there are circumstances that may arise where DOI bureaus may not have adequate time to perform the appropriate NEPA analyses and documentation. However, we are concerned that the DOI NEPA proposed regulations are missing key definitions in their explanation of when a Responsible Official can take immediate actions in response to emergencies, and this may lead to potential abuse. DOI NEPA proposed rule Section 46.150 states that:

> Responsible Officials can take immediate actions in response to the immediate effects of emergencies necessary to mitigate harm to life, property, or important resources without complying with the procedural requirements of NEPA, the CEQ regulations, or this proposed regulation.

This section is written too broadly and could potentially lead to the misuse of the provision that would allow a bureau to bypass the preparation of an environmental assessment or environmental impact statement due to an "emergency." We recommend that "important resources" be removed, or narrowly defined. Without a definition of what an "important resource" is, there is danger that any action could be categorized as an emergency to avoid the NEPA process.

Public Involvement in the Environmental Assessment Process

We are disappointed that the language in DOI's NEPA proposed rule focuses on how not to provide public involvement opportunities in Section 46.305, Public Involvement in the EA Process. It is essential that the public effectively and meaningfully be involved in DOI's decisions—public participation is a fundamental component of NEPA, as evidenced by CEQ's guidance that agencies should facilitate public involvement to the fullest extent possible. 40 CFR §1500.2(d). Meaningful public participation has numerous benefits, including minimizing delays, enhancing community support, and identifying issues and solutions that DOI may overlook without public input.

Section 46.305 states that the bureaus must provide "to the extent practicable" opportunities for public involvement, leaving the method for that involvement to the discretion of the bureau. In addition, there is no requirement for publishing a draft EA or seeking comments on a final EA. Essentially, the agency has discretion to determine on a case-by-base

basis, how to involve the public in the preparation of EAs and whether an EA will be published in draft form for public comment.

We believe this section would have been an excellent opportunity to tie in the policy stated in Section 46.200 encouraging early application and public involvement in the NEPA process. We urge DOI to include positive language and guidance as to how the bureaus can include the public in the preparation of EA, including requiring its bureaus to publish draft EAs for public comment.

Climate Change and NEPA

Climate change is harming many of the public resources managed by DOI. *See generally*, GAO, Climate Change: Agencies Should Develop Guidance for Addressing the Effects on Federal Land and Water Resources (2007). In order to help mitigate the adverse impact climate change is having on the environment, DOI must disclose and analyze greenhouse gas emissions (GHG) through environmental review documents.

DOI and its bureaus are required to address all cumulative and individual "reasonably foreseeable" environmental impacts of their proposed programs, projects, and regulations. 40 C.F.R. § 1508.7-.8. "The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity*, 508 F.3d at 550. Accordingly, DOI must include consideration of the impacts climate change in its environmental analysis. Such consideration is not limited by the global scope of climate change—DOI has a legal obligation under NEPA to "recognize the worldwide and long-range character of environmental problems" and support international efforts to prevent "declines in the world environment." 42 U.S.C. § 4332(F).

DOI has an opportunity to address climate change in an efficient and effective way through programmatic and regional NEPA analyses. While some agencies have been doing some analysis of global warming impacts in NEPA documents, much more needs to be done to make agency decisions that help reduce warming and limit the negative impacts to the nation's treasured public lands from the warming that does occur. We recommend that DOI's NEPA regulations include a mandate that environmental analysis accompanying Resource Management Plans (RMPs) include analysis of climate change impacts on resources within the covered area, such as wildlife, water and air. We also urge DOI to require that the planning documents for fossil fuel developments analyze various energy development alternatives, including energy efficiency and conservation to meet energy needs. The regulations should also require bureaus to analyze the overall direct and cumulative effect of production -related emissions and combustion of oil, gas, and coal on carbon dioxide output and thereby global climate change.

Sincerely,

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